IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. RANDALL BRANCH and JOHN BRANCH, Defendants.	)	CRIM. No. 14-23

COMES NOW Defendant John Branch ("Branch"), by and through his counsel of record, The Bernhoft Law Firm, S.C., and respectfully files this Sentencing Memorandum to address relevant issues concerning his sentencing scheduled for April 24, 2017.

ARGUMENT

The transcendent issue before the Court is a determination of what sentence would be sufficient, but not greater than necessary, to meet the goals of our sentencing regime codified at 18 U.S.C. § 3553. Pursuant to *Booker* and its progeny, this statutory mandate requires the sentencing court to consider all the defendant's characteristics and circumstances of the offense, and if necessary, reject advisory guidelines that are not based on national sentencing data and empirical research. *See United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 261 (2009); and *Nelson v. United*

States, 555 U.S. 350 (2009); *Dorsey v. United States*, 567 U.S. 260 (2012); *United States v. Langford*, 516 F.3d 205 (3rd Cir. 2008).

Under the facts and circumstances of this case, the sentence sufficient but not greater than necessary to meet the mandates and goals of 18 U.S.C. § 3553 is a sentence of one year of probation, with the first six months served under home detention. The justifications for this sentence, as set forth in detail below, are: (1) even with proper calculation and application of the guidelines, the advisory guideline sentencing range provides no useful advice, as it was not developed based on empirical data or national experience, and fails to satisfy most of the goals of our modern sentencing regime; and (2) John Branch's multiple, positive, individual characteristics – including extremely low probability of recidivism and first offender status – amply justify a substantial downward variance from the advisory Guidelines range the Court ultimately determines.

I. THE COURT SHOULD DISREGARD THE ADVISORY GUIDELINE RANGE AND VARY DOWNWARDLY, BECAUSE THE TAX LOSS GUIDELINE WAS NOT BASED ON EMPIRICAL DATA OR NATIONAL EXPERIENCE.

The Sentencing Commission's institutional role in formulating guidelines "sufficient, but not greater than necessary" consists of two basic components: (1) reliance on empirical evidence of pre-Guidelines sentencing practice; and (2) review and revision in light of judicial decisions, sentencing data, and comments from participants and experts in the field. *Rita*, 551 U.S. at 349. Where the Commission has failed to base its formulation of a guideline upon these two components, or rather when a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role" because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case" and "may vary [from Guidelines ranges] based solely on policy considerations." *Kimbrough*, 552 U.S. at 109. The Guidelines calculation is indeed important, however, because an incorrect calculation is almost never harmless error. *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1349 (2016) ("[A] defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief under Rule 52(b).")

Guideline ranges involving regulatory offenses, fraud, tax, and other non-violent crimes are particularly vulnerable to scrutiny due to the Committee's failure to base the ranges on empirical evidence of accurate pre-Guidelines sentencing practice and data, as well as judicial decisions and comments from participants and experts in the field. Particularly relevant here, the criminal tax guideline is a pointed example of where the Commission failed to properly exercise its institutional role. The development of the tax guideline, Chapter 2, Part T, is a clear example of how the Commission's flawed use of data, combined with its failure to heed national experience, has resulted in ranges that diverge dramatically from past practice, and largely fail to achieve the legitimate purposes of sentencing.

A. The Numerical Anchor Used by the Commission in Developing the Tax Loss Guideline is Based on a Remarkably Flawed Data Set.

According to the Commission, and consistent with its institutional role, the most important question for the Commission in its guideline development was: "What sentence [was] typical for defendants who are first-time offenders and are convicted at trial?" *See* U.S. Sent'g Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, Table 1(a), p. 22, 34 (1987), available at http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf ("*Supplementary Report*"). Rather than yielding an estimate of the average *sentence imposed* for crimes, however, the Commission's answer to this question manifested in the form of the average *of time served* currently by convicted federal defendants. *Id.* at 34. As discussed below, because this average of time served, rather than the average sentence imposed, served as the Commission's "numerical anchor" for guideline development, the Guidelines deviated substantially from past sentencing practice. *Id.* at 22.

While the Sentencing Commission did, in fact, attempt to use empirical averages as the starting point for the first iteration of the Guidelines issued in 1987, the average sentences the Commission relied upon were estimated based upon a selective data set that included only sentences of imprisonment, excluding sentences of probation entirely:

> Table 1(a) indicates that a first-time offender who is convicted at trial of embezzling $5,000 from a federally insured bank can expect to receive a sentence at about level 9 (4-10 months) if sentenced to prison.

> However, embezzlers who steal this amount receive prison terms in only about 33 percent of the instances. Consequently, the average prison term, considering all first-time embezzlers who are convicted at trial, is closer to 2 to 3 months.

Id. at 24 (referring to Table 1(a) beginning on p. 27).

As acknowledged by the Commission itself, the exclusion of sentences of nearly two-thirds of all offenders convicted of embezzlement in the amount of $5,000 – all of which were probationary sentences – had a significant upward impact on the Commission's numerical anchor.

Considering that prior to the advent of the Federal Sentencing Guidelines, most defendants convicted of criminal fraud violations historically received probationary sentences, the Commission's selective use of data has similarly impacted the criminal tax guideline, resulting in ranges that diverged dramatically from past practice.

For example, with respect to first-time offenders convicted of a baseline income tax offense involving a tax loss of between $100,000 and $400,000, the Commission estimated and relied upon an average sentence of about 12 months. *Id.* at p. 34. The Commission's reliance upon this "average sentence," however, is misplaced because the Commission calculated only the *average sentence of incarceration*, excluding from consideration all non-prison sentences which accounted for sentences in approximately 22% of tax cases involving a tax loss between $100,001 and $400,000. *Id.* at p. 34 (see last column of Table 1(a)). Had the non-prison sentences been included in the data set used by the Commission, the Commission would have determined that all first-time income tax offenders convicted at trial of causing between $100,001 and $400,000 in tax loss were sentenced to an average of just 9.3 months in prison. (Calculation: 12-month average incarceration for 78% of convicted defendants and 0-month average incarceration for 22% of convicted defendants leads to an average 9.3-months incarceration for all convicted defendants, rather than an average of 12 months.)

With the average sentences relied on by the Commission excluding all data falling at one end of the sentencing spectrum – probation – the "numerical anchor" upon which the first tax guideline was pegged was the result of a flawed selection of "empirical data and national experience." The survey of past practices revealed that a large proportion of first-time income tax offenders were simply sentenced to probation and, had the Commission accounted for the large number of non-prison sentences imposed in income tax cases, the initial guideline range assigned by the Commission in income tax cases would likely have been lower. Because the income tax guideline has rested upon on a flawed selection of empirical data and national experience from the advent of the guideline, it fails to "exemplify the Commission's exercise of its characteristic institutional role" and instead unduly emphasizes imprisonment, resulting in a guideline artificially biased toward harsher sentences. Accordingly, and because the tax guideline yields a sentence that is greater than necessary to advance the purposes of sentencing, this court should vary downward from the advisory guideline range.

B. Today's Income Tax Guideline is Not Based on Empirical Evidence or National Experience.

The Commission has explained that it designed the Guidelines to constrain sentences within a narrow range based on average time served in cases in which a sentence of imprisonment was imposed (discussed above), a goal nowhere to be found in the Sentencing Reform Act:

> By constraining sentences within a fairly narrow range centered about average current practice, such guidelines limit the otherwise broad range of sentences that may be (and currently are) imposed. That is precisely their goal. As a result, there are fewer very lenient sentences (*e.g.*, straight probation), just as there are fewer very harsh ones. Punishment is distributed more evenly.

Supplementary Report, at 17.

Despite the fact that most pre-Guideline, first-time income tax offenders were sentenced to probation, when the Commission adopted the original guidelines in 1987 it required some form of confinement for all but the least serious cases, and adopted a tax guideline requiring no less than 0-6 months and no more than 27-33 months for defendants in Criminal History Category I. *See* U.S.S.G. § 2T4.1 (1987) (imposing sentences between only Level 6 and Level 18 absent additional adjustments); *see also* U.S.S.G. Sentencing Table (1987) (wherein the maximum sentence under the 1987 income tax guidelines before adjustments was 33 months). The Commission explained that "the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm." U.S.S.G., ch. 1, intro., pt. 4(d) (1987); *see also* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines*

Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, p. 56 (2004) (Commission sought to ensure that white-collar offenders face "short but definite period[s] of confinement") ("*Fifteen Year Report*").

This deterrence rationale was not based on any empirical evidence. To the contrary, the empirical research regarding white-collar offenders shows no difference between the deterrence effect of probation and that of imprisonment. *See* David Weisburd, *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."). Despite the actual empirical research, the Commission even abandoned its original goal of ensuring "short but definite" sentences and has been steadily increasing the prison sentences for all tax offenders since 1989.

The Guidelines' bias toward imprisonment over probation also fails to "[r]eflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," as directed by Congress. *See* 28 U.S.C. §§ 991(b)(1)(C), 994(f) (directing the Commission to create and revise the guidelines to reflect such advancements); S. Rep. 98-225, 161, 1984 U.S.C.C.A.N. 3182, 3344 (1983) ("Subsection (b)(1)(c) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches"). The decrease in probation sentences and increase in the length of imprisonment sentences imposed under the Guidelines – *see* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1350 (2005) (sentence length has nearly tripled while probationary sentences have declined from 48% to 6.2%) – do not, however, reflect advancement and learning with respect to the effectiveness of sentencing policies. Instead, the Guidelines, and the incarceration boom the Guidelines have caused, reflect the opposite. As early as 1996, the Commission acknowledged data suggesting the Guidelines were leading to over-incarceration and exacerbating the risk of recidivism, and further acknowledged that non-prison sentences are associated with less recidivism than prison sentences. *See also* U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options under the Guidelines* (Nov. 1996), available at http://www.ussc.gov/Research/Working_Group_Reports/Simplification/SENTOPT.PDF (also noting that many federal offenders who do not currently qualify for alternatives have relatively low risks of recidivism compared to offenders in state systems and to federal offenders on supervised release and that "alternatives divert offenders from the criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties") ("*Sentencing Options*"); *see also* U.S. Sent'g Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole*

Commission Salient Factor Score (Jan. 4, 2005), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf.

The Commission has further ignored its institutional role by ignoring feedback and comment from the most knowledgeable and experienced participants: U.S. District Court judges. As part of a survey conducted by the Commission, federal circuit and district court judges were asked to "identify where you believe that changes in the availability of guideline *sentence types* would better promote the purposes of sentencing. *See also* U.S. Sent'g Comm'n, *Summary Report: U.S. Sentencing Commission's Survey of Article III Judges*, App. B-7 (Dec. 2002), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/200303-judge-survey/jsfull.pdf. Of the responding judges, 38.2% said they believed that straight probationary sentences and 46.1% said probation with confinement conditions should be "more available" in fraud cases. *See id.* Despite these advances in knowledge and feedback relating to effective sentencing, especially with respect to white-collar offenders, the Guidelines continue to dictate severe sentences of incarceration.

Moreover, there are numerous areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include: (1) research showing the efficacy and cost savings of drug treatment, education and job training over lengthy incarceration in reducing crime, *see* Don Stemen, *Reconsidering*

Incarceration: New Directions for Reducing Crime, Vera Institute of Justice, January 2007, available at: http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment); (2) reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value, *see* U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (Feb. 1994), available at http://www.fd.org/docs/select-topics---sentencing/1994-DoJ-study-part-1.pdf; and (3) research on the adverse impact of incarceration on children and families, *see* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview*, (2001), available at https://www.ncjrs.gov/pdffiles1/ojjdp/frd030127.pdf (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship*, p. 7 (2005), available at: http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarceration-and-Crime-A-Complex-Relationship.pdf ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); Patricia M. Walk, *"What About the*

Kids?": Parenting Issues in Sentencing, 8 Fed. Sent. Rep. 137 (1995) (discussing growing body of research showing that children fare better in their parents' care than elsewhere).

Finally, and in addition to the problem of the unwarranted and unsupported incarceration bias of the Guidelines, it should be noted that the primary metric upon which the seriousness of white-collar offenses is measured is also deeply flawed, if not totally arbitrary. While the amount of "loss" is the primary determinant of the offense level for white-collar offenders, loss is a highly imperfect measure of the seriousness of the offense. *See United States v. Adelson*, 441 F.Supp.2d 506, 509 (S.D.N.Y. 2006) (criticizing the "inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss" without any explanation of "why it is appropriate to accord such huge weight to [this] factor[]"). The amount of loss is often "a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence." *United States v. Emmenegger*, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004). Basing the guideline range almost entirely upon something like "loss" is simply more cause for the court to disregard the range in full.

Despite the advancements in the Commission's understanding of criminal justice sentences and non-prison alternatives, and despite the feedback received from judges and independent research, the Commission has not amended the Guidelines to reflect that understanding. The Commission has failed to rely on empirical data or national experience in promulgating and amending § 2T4.1 and as a result, has failed in its institutional role. The guideline range is simply unreliable and yields a sentence of incarceration far greater than necessary to achieve § 3553(a)'s purposes. Accordingly, this court should vary downward considerably from the advisory guidelines' range.

II. A SUBSTANTIAL DOWNWARD VARIANCE IS NEEDED IN THIS CASE IN ORDER TO EFFECTIVELY MEET THE GOALS OF SENTENCING, FEW OF WHICH ARE TAKEN INTO ACCOUNT BY A GUIDELINE RANGE THAT IS NOT BASED ON EMPIRICAL DATA AND NATIONAL EXPERIENCE.

After the Supreme Court held in *Booker* that the federal sentencing guidelines were advisory and not binding on the sentencing court, the Court recognized the power of the sentencing court to impose a sentence outside the advisory guideline range considering not only the facts of the case before it, but also policy considerations, including disagreement with the policies underlying the guideline applicable to the case. *Gall*, 552 U.S. at 59; *Kimbrough*, 552 U.S. at 101; *Rita*, 551 U.S. at 351. *See also United states v. Merced*, 603 F.3d 203, 221 (3rd Cir. 2010) ("Again, we assume for present purposes that the freedom district courts enjoy under *Kimbrough* and *Spears* includes the freedom to vary from a career offender Guidelines range based on a policy disagreement.").

Especially given that the tax guideline is not based on empirical data and national experience, the sentencing court "may not presume that the Guidelines range is reasonable," but rather must "make an individualized assessment based on the facts presented" to arrive at a sentence that is sufficient, but not greater than necessary. *Gall*, 128 552 U.S. at 50. *See also United States v. Tomko*, 562 F.3d 558, 567 (3rd Cir. 2009) ("In the wake of *Booker*, it is essential that district courts make an 'individualized assessment based on the facts presented.'") (quoting *Gall*, 128 552 U.S. at 50). In doing so, the court is required to follow the framework set forth in § 3553 (a), as further informed and guided by Supreme Court authority, and consider all mitigating factors that are relevant to any purpose of sentencing. After calculating the applicable guidelines range, the court must consider the statutory factors listed in 18 U.S.C. § 3553(a) to determine whether a sentence within the guidelines range is appropriate. In turn, Section 3553(a) requires the imposition of a sentence sufficient, but not greater than necessary to achieve respect for the law, just punishment, deterrence, protection of the public, and needed education and treatment, while taking into account the nature of the offense, the history and characteristics of the defendant, the need to avoid unwarranted sentence disparities, and the guidelines.

Here, even if the correct offense level is used, the guideline range should not be heavily relied upon because it fails to effectively promote many purposes of sentencing. Not only is the guideline range the product of a guideline that is not based on empirical evidence or national experience, but it also: (1) fails to provide significant, if any, deterrent effect; (2) ignores John Branch's very low risk of recidivism; (3) would result in unwarranted disparity as compared with sentences for similarly situated defendants; (4) eschews more effective, alternative sentences in favor of incarceration; and (5) does not account for the individual characteristics of Mr. Branch that favor a sentence of less incarceration, not more.

In fact, as suggested by the Commission itself, increasing the certainty and severity of punishment is the only goal of sentencing reform articulated in the Sentencing Reform Act that the tax guideline, and the guidelines as a whole, fully achieve. *See Fifteen Year Report*, p. 138 ("For offenders who are imprisoned, the length of time served has increased substantially in the guidelines era. The average time served more than doubled after implementation of the guidelines . . . increasing from an average of just under 25 months to almost 50 months."). Here, and starkly, because the imposition of a guideline range sentence would seem at odds with Section 3553(a)'s overarching statutory command to "impose a sentence sufficient, but not greater than necessary," the court should disregard the guideline sentence and fashion a discretionary sentence to abide by the mandate.

A. A Lengthy Sentence of Incarceration Will Not Provide Additional Deterrent Effect.

While the certainty of being caught and punished has a deterrent effect, research has shown that "increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006) ("Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence."); *see also* Gabbay, *supra*, 447-48 ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.").

As discussed above, research regarding white-collar offenders in particular has found no difference in the deterrent effect of probation and that of imprisonment. *See* Weisburd, *supra*; *see also* Gabbay, *supra*, at 448-49 ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."). The failure of a longer sentence of imprisonment to have any additional deterrent effect upon John Branch – as suggested by all the research on the subject – favors a downward variance, below the term suggested by the advisory guideline range.

B. John Branch is Not a Threat to his Community, Nor is He a Threat to Repeat as an Offender.

John Branch's very low risk of recidivism also favors a downward variance in his sentence. Not only is the risk of recidivism rate for all defendants convicted of a white-collar offense extremely low, *see* Weisburd, *supra*; Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. Crim. L. & Criminology 731, 758 n.159 (2007) (citing U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 30 (2004) ("*Measuring Recidivism*"); P.B. Hoffman & J.L. Beck, *Burnout -- age at release from prison and recidivism*, 12 J. Crim. Just. 617 (1984), but a number of other characteristics of John Branch suggest that he is highly unlikely to recidivate, *see Measuring Recidivism*, Ex. 9, at 28; Ex. 10, at 29 (Branch's age at sentencing: 45 years old, only 6.9% of those aged from over 50 years old recidivating in Category I; Branch's race: only 8.9% of white defendants in Category I recividated; Branch's Marital Status: only 9.8% of married offenders recidivating in Category I).

Because Branch's individual characteristics indicate that he is highly unlikely to recidivate, a lengthy sentence of incarceration would only serve to *increase* his risk of recidivism. Offenders are most likely to recidivate (25.6%) when their sentence is a straight prison sentence. *See id.* at 13. On the other hand, of offenders sentenced to a probation only sentences, only 15.1% recidivate, and offenders serving a sentence of probation combined with confinement alternatives have a rate of 16.7%. *See id.* In imposing the least sentence sufficient to account for the need to protect the public from further crimes of Branch, the court should consider the statistically low risk of recidivism he presents.

C. Many Similar Cases Have Warranted a Below-Guideline Range Sentence, Often Consisting Only of Probation.

The court must also impose a sentence that avoids unwarranted disparities among defendants with similar criminal histories convicted of similar criminal conduct. 18 U.S.C. § 3553(a)(6). In fiscal year 2016, sentences below the guideline range were imposed in about 75.5% of tax cases, with non-government sponsored below-guideline range sentences imposed in about 47.2% of these cases. *See* U.S. Sent'g Comm'n, *Preliminary Quarterly Data Report, Third Quarter FY 2016*, Table 10.[1] Only 23.0% of all sentences imposed in tax cases were within the guideline range and just 1.5% were above the guideline range. *Id.*

Of all defendants convicted of tax related offenses in 2016, 28.1% did not receive a sentence of imprisonment at all. *Id.* at Table 7. For the remaining 59.1% of offenders upon whom a term of imprisonment was imposed, the average sentence received was 13 months. *Id.* at Table 6. Of below guidelines sentences that were *not* sponsored by the government in tax cases, the median sentence imposed was 0

[1] Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2016_Quarterly_Report_Final.pdf.

months. *Id.* at Table 17. That a substantial majority of all defendants convicted of tax related crimes receive a sentence below the guideline range is a factor that should be taken into consideration to advance the objectives of 18 U.S.C. § 3553(a).

D. A Combination of Sentencing Alternatives Will Effectively and Fully Achieve the Goals of Sentencing.

The court must consider all of the kinds of sentences available by statute, § 3553(a)(3), even if the only sentence established by the guidelines' zones is a lengthy prison term. § 3553(a)(3); *see Gall*, 552 U.S. at 59. Congress has directed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense," and the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j). Congress issued this directive in the belief that "sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society," and that "in cases of nonviolent and non-serious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service." *See* Pub. L. No. 98-473, § 239, 98 Stat. 1987, 2039 (1984) (set forth in 18 U.S.C. § 3551 note).

John Branch is certainly not the "violent and serious offender" who "pose[s] the most dangerous threat to society," but nevertheless, for purposes of general deterrence, we believe six months of home detention is warranted.

E. Other Very Positive Individual Characteristics of John Branch Favor a Downwardly Variant Sentence.

John Branch was born in Warren County, Pennsylvania and raised by his father Randy and Randy's common law wife Jane. Jane suffered from alcoholism and related issues, creating a rather turbulent child rearing environment. John's father and mother separated when John was eleven years old, and he went to live with his mother. His mother subsequently withdrew him from school in the fifth grade and, as John framed it in his PSR interview, he "sort of raised himself." Nevertheless, John speaks positively about both his mother and father.

John went to work in the oil fields shortly after being withdrawn from elementary school, and by age thirteen he was threading pipe and servicing wells. John and his father subsequently purchased their first ever oil lease in 1990, and the father and son team have been drilling wells, extracting oil, and selling natural gas and oil ever since. Although father Randy is an engaging man with a very good reputation in the community, he viewed government in suspicious terms and held somewhat unorthodox views about government authority and power generally – views that young John quickly absorbed.

So it was that when John encountered information challenging the scope and nature of the federal income tax, he was unfortunately well primed to succumb – and succumb he did, earnestly researching everything he could find on the subject.

With John's laser-like focus on work and family, he unfortunately did not have any age peers who might have "checked" his growing obsession with federal income tax law, nor any father figure who could have blunted these tendencies with reasoned argument.

To be sure, John Branch will not be excited that undersigned counsel is making these observations, because as will be shown below when discussing the many character reference letters filed with this brief, he is a hardworking, responsible man who doesn't make excuses and takes responsibility for his actions. Nevertheless, these things must be said, because they provide the important context in which John made the bad decisions that have brought him before this court for sentencing.

John Branch has also been a positive contributor to this community for many decades, forging dozens of lifelong relationships with people from all walks of life. As evidenced by the numerous support letters written on his behalf, John enjoys an extraordinary amount of support in the community, not just from his immediate family, but from dozens of friends, colleagues, and business associates. (Letters 1-29.) Several common threads weave their way through these remarkable letters, all of which describe a universally trusted man, a selfless friend who comes to the aid of those in need at the drop of a hat, someone whose word can be counted on, who's loyalty and integrity is never questioned, a generous man who liberally offers his time, money, and talents to help those around him in a variety of circumstances.

Among the men and women who took the time to write the court on John's behalf are: a Warren County Deputy Sheriff; a former Deputy Sheriff and City of Warren Police Sergeant; a former Navy SEAL; a former United States Marine non-commissioned officer; the current Chairwoman of the Warren County Commissioners; and numerous other friends and colleagues. The letters speak to the writers' collective surprise upon learning that John had been charged with tax crimes and was facing federal sentencing. The authentic expressions of surprise and concern speak volumes about how John Branch has conducted himself ethically and positively in this community for decades.

Several themes are woven through all these letters, including personal observations and experience that John Branch is an honest man, a man of integrity, a loyal man who keeps his word in matters of business, and a devoted family man who cherishes his wife Azad and their two children, six-year old Bridgette and four-year old Jack. (Exhibits A-E, Branch family pictures). As fellow old field worker Scott Green relates: "These men [John and Randy Branch] are a step above the norm . . . I also consider both men to be honest and literally, men of integrity; *they say what they do and do what they say*." (Letter #6) (emphasis added). The Reverend Randall Nalbone unequivocally affirms that: "[John] is first and foremost a family man," then goes on to observe that John "is a hard worker" and "a humble man," exhibiting "humility and selflessness." (Letter #3.) George Czapp, a friend of over twenty year, relates that ". . . I wouldn't be able to write this [letter] if it weren't for Mr. Branch saving my life while scuba diving in the Florida Keys. He was instrumental and selfless in my time of need and I will be eternally grateful for his actions on that terrible day." (Letter #13.)

Notably, John's ex-wife Michelle also supports him, writing that even though her 5-year-old son's father is not in their lives, "John helps to make sure that [her son] has a male role model and ensures he doesn't not feel left out because he does not have a father. John is there for his birthdays, school programs, and other events . . ." (Letter #2.) Former Navy SEAL and current CEO of the Warren County YMCA, Thad Turner, relates that John is "a man of his word." (Letter #8.) Warren County Deputy Sheriff Craig O'Conner writes: "I know that John is a very honest man and tells it like it is . . . . You can't find many people out there these days that are as honest and hardworking as John is . . . . He is truly a good and honorable man and I am proud to call him my friend." (Letter #4.) In explaining the tax conduct that seems totally at odds with the man described in these many letters, former U.S. Marine David White observes: "You have to understand John was never educated," then goes on to declare that "[i]n business his word is his bond. A verbal contract with John Branch is better than any written contract you could put together." (Letter #11.)

There are many other important observations in the twenty-nine support letters written for John Branch by members of the community, but suffice to say these letters are emblematic of the respect he enjoys in Warren County – respect that was earned through decades of demonstrated good character and concern for others, something the court should take into consideration when fashioning a sentence that is minimally sufficient but not greater than necessary to achieve our sentencing regime's goals.

Moreover, if allowed a sentence of home detention, John Branch will be able to reinvigorate his oil business – a business that has been substantially lagging since negative publicity surrounding his indictment chilled banking relationships and possible business deals. As is, Branch's business is hyper-dependent on John personally because of his unique system of "slant" drilling that facilitated the ability to tap into good oil resources that were previously unreachable. John also has the knowledge and experience to custom make various shaping charges and explosives that are essential to his oil and natural gas business. Because of his cave diving expertise, he is one of the few people in the country that are both able and willing to drop down into narrow holes and chambers to place these charges. (Exhibits F-N, John Branch at work.) None of these specialized areas of knowledge and function are fungible to others, and without his physical presence and contributions the business will bankrupt.

Such a result would not be positive for either John Branch or the larger community, as it would deprive the community of much needed economic inputs and outputs, and create a situation where it would be simply impossible for John to pay off the substantial additional tax liabilities he owes, in addition to the tax restitution already paid. For unlike many tax defendants, John has not only made the decision to fully comply with all state and federal tax filing and payment requirements, he has executed on that decision with full payment of the

$377,643.74 restitution amount and the $25,000 criminal fine the plea agreement calls for. In addition, he as approved draft tax returns for the 2013, 2014, and 2015 tax years, and those returns will be filed with IRS yet this week prior to sentencing. There won't be any "hide-and-seek" with IRS after sentencing for John Branch: he has authorized and funded full tax compliance in all respects, showing through his actions, not just words, the depth of his commitment to make full amends for his mistakes and to obtain closure on a very difficult chapter in his life.

F. This Circuit has Approved a below Guidelines Sentence of Probation with a Home Detention Component on Very Similar Facts.

A below-Guidelines probationary sentence with a home detention component is appropriate given Branch's unique characteristics and the circumstances surrounding this case. In *United States v. Tomko*, 562 F.3d 558, 573 (3rd Cir. 2009) (*en banc*), the appeals court described a variance from a low-end twelve months Guidelines sentence to probation and home detention as "not substantial," despite the fact the change was technically 100% lower than the Guidelines range. *Id.* at 573. *Tomko* also noted the Supreme Court had upheld a probationary sentence in a case with a Guidelines low-end range of 30 months. *Id.* (citing *Gall v. United States*, 552 U.S. 38 (2007)). As the *Gall Court* relevantly opined there: "[D]eviations from the Guidelines range will always appear more extreme – in percentage terms – when the range itself is low, and a sentence of probation will always be a 100% departure." *Gall*, 552 U.S. at 47-48 (quoted favorably by *Tomko*, 562 F.3d at 573). "Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the 'substantial restriction' of freedom' involved in a term of supervised release or probation." *Gall*, 552 U.S. at 48 (again quoted favorably by *Tomko*, 562 F.3d at 573).

A probationary sentence is not some sort of windfall for a defendant. As the Supreme Court noted, a probationary sentence substantially restricts a defendant from enjoying several extremely valuable freedoms persons with full liberty enjoy:

> Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. U.S.S.G. § 5B1.3. Most probationers are also subject to individual 'special conditions' imposed by the court.

Gall, 552 U.S. at 48.

Moreover, district courts within the Third Circuit continue to follow *Tomko's* guidance in appropriate cases. *See United States v. Robinson*, 2014 U.S. Dist. LEXIS 48944; 2014 WL 1400197. There, the offense conduct showed that Leland Robinson had failed to file tax returns or pay income tax over many years, and had utilized check cashing stores to conceal over $1.5 million in income from the IRS. *Id.* Robinson pled guilty to two misdemeanor failure to file tax returns, as John Branch has done here. Furthermore Robinson's Guidelines range was 18-24, which is the same agreed upon advisory range that Branch has here, and the Magistrate Judge sentenced Robinson to several years of probation with a three-month home confinement provision and some community service. In affirming the Magistrate

Judge's probationary sentence, the District Court, after citing to *Tomko*, pointed to the many letters from family, friends, and community leaders describing a caring and decent man who made positive contributions to the community as a more than adequate basis for Robinson's below Guidelines sentence.

CONCLUSION

For all the reasons set forth in this memorandum, and as will be further amplified at the sentencing hearing, John Branch respectfully requests that the Court impose a sentence of one year probation with a six-month component of home detention.

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Respectfully submitted,

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